

Bond University
Research Repository



Law and Power: Ten Lessons From Foucault

James, Nickolas

Published in:
Bond Law Review

[Link to output in Bond University research repository.](#)

Recommended citation(APA):

James, N. (2018). Law and Power: Ten Lessons From Foucault. *Bond Law Review*, 30(1), [4].
<https://epublications.bond.edu.au/blr/vol30/iss1/4>

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

For more information, or if you believe that this document breaches copyright, please contact the Bond University research repository coordinator.

2018

Law and Power: Ten Lessons from Foucault

Nickolas John James
Bond University

Follow this and additional works at: <https://epublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

Law and Power: Ten Lessons from Foucault

Abstract

Ten insights into the nature of power and its relationship with law are derived from the work of Michel Foucault: (1) power is not a bad thing; (2) power cannot be abolished; (3) power is not monopolised by the powerful; (4) power is everywhere; (5) power always provokes resistance; (6) power shapes knowledge; (7) power determines truth; (8) law is a strategy of power; (9) law is only one of the many strategies of power; and (10) power and discourse are non-subjective.

Keywords

discourse, knowledge, power

Law and Power: Ten Lessons from Foucault

NICKOLAS JOHN JAMES*

Abstract

Ten insights into the nature of power and its relationship with law are derived from the work of Michel Foucault: (1) power is not a bad thing; (2) power cannot be abolished; (3) power is not monopolised by the powerful; (4) power is everywhere; (5) power always provokes resistance; (6) power shapes knowledge; (7) power determines truth; (8) law is a strategy of power; (9) law is only one of the many strategies of power; and (10) power and discourse are non-subjective.

The following is an expanded version of my welcome address at the Transnational, International and Comparative Law and Policy Network Interdisciplinary Conference, 'The Law and Politics of Control and Power', delivered on 26 May 2017 at Bond University, Australia.

I Introduction

The theme of this conference is 'The Law and Politics of Control and Power'. I would like to offer some reflections upon this theme, drawing upon the work of the philosopher Michel Foucault. I will begin by saying that I do not believe these reflections will be particularly original or novel. I do, however, believe they will be directly relevant to the theme of this conference. And for those for whom the work of Foucault is unfamiliar, they may be, as Foucault's ideas were for me, transformative.

My understanding of Foucault's ideas about law and power arises from my use of the work of Foucault as the theoretical framework for my doctoral thesis. My thesis began as an attempt to understand what it means to think critically about law, and how the ability to think critically about law can be taught to law students. I discovered within the literature about the nature of law and legal education numerous competing descriptions of legal critique and its relevance to legal education. This in turn led to the realisation that legal education is not a singular, monolithic enterprise with all participants sharing a consistent understanding of the nature of law and legal education and the role of critique. Rather, legal education is made up of multiple divergent and competing ideologies, or discourses, each

* BCom LLB(Hons) LLM PhD. Executive Dean and Director of the Centre for Professional Legal Education, Bond University.

characterised by its own descriptions of the nature of law, the purpose of legal education and the role of critique, and each competing for dominance by criticising, mis-describing, undermining or disregarding the other discourses. Foucault's ideas about the nature of discourse, knowledge and power revealed themselves to be enormously useful. His efforts in analysing discourses in the fields of medicine, psychology, criminology, sexuality and ethics lead to a series of insights about the ways in which knowledge and discourse are shaped by power, insights that have proved useful for many scholars in many disciplines, including sociology, history, psychology, philosophy, politics, linguistics, cultural studies, and literary theory.¹

For me personally, these insights not only proved to be useful in my doctoral thesis and subsequent academic work, they have also influenced the way I perceive and interpret claims made and arguments presented in politics and current affairs and even during communications and interactions in my professional life and my personal life. Foucault insisted that most claims that are presented as 'truth' can be viewed as expressions of power by the maker of the claim, seeking to shape the knowledge and understanding of those to whom the claim is made and to subvert or undermine competing claims. This was not presented as a 'bad' thing or as something that should be — or even can be — avoided. Rather, it was presented as a way of looking at competing truth claims that offers useful insights into the dispute, insights that may not be as apparent if one instead strives to simply identify which truth claim is 'really true' and to reject all the others. By viewing competing truth claims as vectors of power that are intersecting and interacting, and analysing those intersections and interactions, we can achieve an understanding that is, in my view, more informative and more aligned with reality than the more simplistic, binary approach where we seek to separate true from false and right from wrong.

Consider, for example, the contemporary political landscape, characterised as it is by the divide between those within the community who identify as progressive and those who identify as conservative. Each side presents its perspective as truth; each side characterises the claims and arguments of the other side as misguided, ignorant or 'fake news'; and each side deploys strategies intended to persuade those on the other side to change sides, to wake up or to at least acknowledge their ignorance. These strategies include rational argument and heartfelt rhetoric, but they also include bullying, abuse, and the use of cruel taunts and name-calling (including 'redneck', 'bigot', 'basement dweller', 'fascist', 'racist' and 'misogynist' from one side; 'leftist', 'libtard', 'feminist', 'SJW', 'snowflake' and 'triggered' from the other). There is a powerful temptation to choose a side in these culture wars, but it can be useful and informative to step back and see the field of discourse as a whole, to look at the debates and arguments as vectors of power, to consider the strategies and

¹ Stephen J Ball, 'Introducing Monsieur Foucault' in Stephen J Ball (ed), *Foucault and Education: Disciplines and Knowledge* (Taylor & Francis, 2012) 1.

technologies of power deployed by both sides, and to see the ways in which each exercise of power by one side provokes resistance and a backlash from the other. Such an approach makes it possible to identify the weaknesses and flaws in one's preferred discourse, and the strengths and insights from the other. The ultimate goal is not to resolve all differences and persuade everyone to see things the same way. Rather, the objective in adopting a Foucauldian approach is to see the state of affairs, and its historical emergence, more clearly, and describe it more accurately.

I applied the Foucauldian approach to Australian legal education in my thesis, and I have just described how it can be applied to contemporary debates in politics. It can be applied to conflicts and debates within any discipline, to any political conflict, to controversies in any field or industry, and to arguments in committee meetings, staff meetings, and lunchrooms anywhere within the academy. It can certainly be applied during conversations about the law and politics of control and power, and it has the potential to reveal unexpected insights about legal and political problems.

If you have the time and the patience, I recommend engaging with Foucault directly and reading his scholarship in his own words. However, Foucault's writings have been described as difficult, complicated and inaccessible to the casual reader,² and you may find it helpful to read *about* Foucault as a supplement to reading Foucault. In this paper, I offer my own interpretation of the Foucauldian approach in the form of ten insights about law and power. They are, of course, an interpretation and a simplification of some very complex, nuanced and challenging ideas expressed by Foucault, and that process of interpretation and simplification necessarily involves a distortion of the original ideas. This is not necessarily a bad thing, and Foucault himself encouraged others to take his ideas and apply them in new ways and in new contexts:

What I say ought to be taken as 'propositions', 'game openings' where those who may be interested are invited to join in — they are not meant as dogmatic assertions to be taken or left *en bloc*.³

It does mean that scholars better acquainted with Foucault's work will almost certainly find fault with my interpretations. Even the reader unfamiliar with Foucault will find some of these insights to be flawed, or obvious. Personally, I have found these insights to have extraordinary explanatory power over the years, and I hope you find at least some of them useful. In presenting the ten insights, I contrast each with a more common sense or naïve understanding of law and power, one which aligns with my own understanding prior to encountering Foucault. I acknowledge that the naiveté may have been solely my own.

² See, e.g., John Searle, 'Foucault and Bordieu on Continental Obscurantism' <<https://www.youtube.com/watch?v=yvwhElhv3N0>>.

³ Michel Foucault, 'Questions on Method' in James D Faubion (ed), *Power: Essential Works of Foucault 1954-1984* (Penguin Books, 2010) vol 3, 224.

II Ten Insights

The notion of power presented here is a common sense one in that it is defined simply as the capacity to exert influence over the thoughts, actions or wellbeing of others. Compelling someone to do something against their will, restraining someone's movement, persuading someone to change their mind, or causing someone physical, psychological or emotional harm are all expressions of power. However, helping someone to do something they could not otherwise do, freeing someone from restraint, teaching them something new or giving someone physical, psychological or emotional pleasure are also expressions of power. If I say or do something that shapes or influences your experienced reality, I am exercising power over you.

This, then, is the first insight from Foucault: *power is not a bad thing*. We often talk about power in negative terms, as if it necessarily involves repression or someone being forced to think or do something they would not otherwise choose to think or do. But power can also be exercised in a way that facilitates desired outcomes, or motivates or inspires others. Power can be productive. In *Truth and Power*, Foucault wrote:

But it seems to me now that the notion of repression is quite inadequate for capturing what is precisely the productive aspect of power. In defining the effects of power as repression, one adopts a purely juridical conception of such power; one identifies power with a law which says no — power is taken, above all, as carrying the force of a prohibition. Now I believe that this is a wholly negative, narrow, skeletal conception of power, one which has been curiously widespread. If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression.⁴

In *Discipline and Punish: The Birth of the Prison*, Foucault wrote:

We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact power produces: it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.⁵

Power is not, per se, something that needs to be criticised or avoided whenever it arises. The ways in which power is exercised may be deserving of criticism, but power itself is neither good nor evil. It simply is. Foucault insisted that instead of judging power, we should investigate what forms of power are at work in those situations we seek to understand.

⁴ Michel Foucault, 'Truth and Power' in James D Faubion (ed), *Power: Essential Works of Foucault 1954-1984* (Penguin Books, 2010) vol 3, 120 ('*Truth and Power*').

⁵ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books, 1991) 194 ('*Discipline and Punish*').

Foucault also tells us that *power cannot be abolished*. We may believe that to be genuinely free we must remove ourselves from the influence of power, but there is no place where power is absent and freedom prevails. Power is always present in one form or another. If freedom does exist, it is the capacity to choose the forms that power takes. Foucault might even go further and say that ‘freedom’ as a concept is itself a technology of power. It is no more than one of strategies deployed within liberal discourse to encourage adherence to liberal principles, an illusory possibility that can never be realised because the notion of a subject that can be free is itself illusory (see below). We are always subject to power – and we are always exercising power.

This leads to the third insight: *power is not monopolised by the powerful*. Prior to encountering Foucault, I thought of power as something possessed by the few and exercised to the disadvantage of the many. The state had power: the executive government, the legislature, and the judiciary. The wealthy had power: rich businesspersons and large corporations. The rest of us were powerless, subject to the directives and whims of the powerful unless we took action to free ourselves. Foucault showed, however, that while the powerful do indeed wield power, power is wielded by everyone. He rejected the ‘zero sum’ view of power. Power is not something which is held and used by some, and lacked by others. Men exercise power over women, the strong exercise power over the weak, the rich exercise power over the poor, members of the dominant culture exercise power over minorities, and the able exercise power over the differently abled — but women also exercise power over men, the weak exercise power over the strong, the poor exercise power over the rich, minorities exercise power over members of the dominant culture, and the differently abled exercise power over the able. There are no powerless; there are only different types of power.

This is not to say that power is always exercised fairly or that injustice does not exist. Power can be, and often is, exercised oppressively. Foucault stressed that the play of power does produce systematic power relations, and that there are rulers and ruled, dominators and dominated. However, to focus only upon the exercise of power by the obviously powerful over the less obviously powerful is to oversimplify a state of affairs that is better seen as a complex and dynamic interplay of competing and overlapping vectors of power.

The fourth insight is that *power is everywhere*. We do not only encounter power when we engage with the government, the legal system, our employers or the wealthy and influential. Power is present in all forms of social relations, it is ‘at work’ in every situation. We encounter and engage with power every minute of every day, whenever others exercise power over us, whenever we exercise power over others, and whenever we exercise power over ourselves.

To distinguish these localised types of power from the power exercised by the state, Foucault referred to the ‘micro-physics’ of power, or ‘micro-power’. He insisted that micro-power, in particular power located in sites

away from the central locations of macro-power, had become a defining characteristic of power.⁶ And any analysis of power ‘should not concern itself with the regulated and legitimate forms of power in their central locations’, but ‘with power at its extremities, in its ultimate destinations, with those points where it becomes capillary, that is, in its more regional and local forms and institutions’.⁷ If, for example, we want to analyse the power of the major banks in Australia, we should not limit our analysis to the way banks relate to, and are regulated by, the state: the legislation that applies to banking, the profits that they make, and the taxes that they pay. We should also consider the way banks and banking impact the lived experiences of individuals on a daily basis: the way individual clients use particular banking apps, pay various types of banking fees, transfer funds to each other, visit specific local branches, use specific ATMs, and so on. To ignore the operation of micro-power is to conduct an incomplete analysis.

Micro-powers do not, however, exist in a vacuum; they interrelate, they compete, and they sometimes align. In *The Will to Knowledge*, Foucault suggested that some micro-powers may ‘form a general line of force that traverses the local oppositions and links them together ... Major dominations are the hegemonic effects that are sustained by all these confrontations’.⁸ This view uses the metaphor of a ‘vector’ of power, in which a number of different forces act in such a way to produce an aggregate force acting in a direction different from many of the originating forces. The attraction of this model is that the micro-powers remain autonomous and there is no implication of intentionality or purpose which underlies or explains the direction in which the resultant force operates. This model also avoids an overly simplistic, binary representation of power relations. As Foucault insisted:

[O]ne should not assume a massive and primal condition of domination, a binary structure with ‘dominators’ on one side and ‘dominated’ on the other, but rather a multiform production of relations of domination which are partially susceptible of integration into overall strategies.⁹

A focus upon the operation of micro-powers reminds us that power is always present. In fact, power is present now as you read this text; by presenting my ideas to you and arguing in their favour I am seeking to transform your beliefs about law and power — and this is an attempt by me to exert power over you. And to the extent that you question or disagree with any of these ideas, my exercise of power is provoking resistance in you, and this is an exercise of power by you.

⁶ Michel Foucault, *The Will to Knowledge: The History of Sexuality* (Penguin Books, 1998) vol 1, 26 (‘*The Will to Knowledge*’).

⁷ Michel Foucault, ‘Two Lectures’ in Colin Gordon (ed) and Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Vintage, 1980) 96 (‘*Two Lectures*’).

⁸ Foucault, *The Will to Knowledge*, above n 6, 94.

⁹ Michel Foucault, ‘Power and Strategies’ in Colin Gordon (ed) and Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Vintage, 1980) 142.

The fifth insight is that *power always provokes resistance*. Whenever power is exercised, resistance will arise. Foucault wrote:

[T]here are no relations of power without resistances; the latter are the more real and effective because they are formed right at the point where relations of power are exercised; resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through being the compatriot of power. It exists all the more by being in the same place as power.¹⁰

Resistance is not external to power. It is an inevitable, ever present aspect of the exercise of power:

Where there is power there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power ... These points of resistance are present everywhere in the power network. Hence there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case; resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant or violent; still others that are quick to compromise, interested, or sacrificial; by definition they can only exist in the strategic field of power relations.¹¹

The more forceful the exercise of power, the greater the resistance. The resistance may be as modest as a negative thought or a critical comment, it may take the form of a refusal to cooperate, and in extreme cases it may take the form of political action, insurrection and revolt. Whether it is a state imposing an unwelcome or unjust law upon a community, or a law teacher striving to exert discipline over an unruly class, the exercise of power will be resisted. This is not necessarily because the exercise of power is inappropriate (although it may be). Rather, the resistance is an inevitable consequence of the exercise of power. Physics provides a helpful analogy: movement in one direction almost always encounters some form of friction, and that friction is resistance. Friction is of course absent in a vacuum — but power is never exercised in a vacuum because it is always exercised in relation to something or someone else.

Foucault did not suggest that a discursive field consists of a simple competition between a dominant discourse and a resistant discourse:

[W]e must not imagine a world of discourse divided between the accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play in various strategies.¹²

It would be overly simplistic to portray any complex situation as consisting of a binary tension between conservative and progressive, between orthodox and radical, or between hegemonic and marginalised discourses. Rather, there is a dynamic and unstable confusion of contesting and cooperating discourses and resistances. This of course makes a

¹⁰ Ibid 142.

¹¹ Foucault, *The Will to Knowledge*, above n 6, 96.

¹² Ibid 100.

Foucauldian analysis much more complicated, but it is also much more realistic.

The sixth insight is that *power shapes knowledge*. Foucault is perhaps best known for his investigations into the intimate relationship between power and knowledge, and coined the term ‘power-knowledge’ to indicate this relationship. (He did not, however, insist that power and knowledge are the same thing.) The production and dissemination of knowledge is an expression of power, and the expression of power always involves the production and dissemination of knowledge. The accumulation of knowledge, whether as individuals or as a community, is not the outcome of an apolitical quest for absolute, universal truth. Rather, what we know, individually and collectively, is the outcome of conflicts and contests between competing discourses and competing explanations, outcomes that are determined not by consistency with reality but in favour of those capable of exercising power most effectively. What a law student knows about contract law is determined in large part by what they are taught in the contract law classroom, and this is determined not by consistency with universally accepted principles of contract law but by the outcome of generations of debates involving academics, lawyers and judges about the content and nature of contract law. What we know about our fundamental human rights is not based on universally accepted principles but upon the outcome of complex and lengthy political processes and academic debates about the content and extent of those rights, and those processes and debates involve numerous competing discourses, claim, arguments and positions. Discourses, according to Foucault, “must be treated as discontinuous practices, which cross each other, are sometimes juxtaposed with one another, but can just as well exclude or be aware of each other”.¹³ Every discourse, ideology and perspective is in perpetual competition with alternative worldviews. The knowledge that ends up being accepted as truth is determined by power.

This is the seventh insight: *power determines truth*. ‘Truth’ is no more than a status that various knowledges claim. According to Foucault, truth and knowledge are not to be accepted as universal but instead investigated and understood in terms of the conditions of their production and dissemination. Foucault appears to have believed that there are no universal or self-evident truths. Rather, all truths are contingent, conditional and, often, arbitrary. Something is accepted as truth because someone powerful insisted that it was true and others accepted it. This is an insight that is obvious to many, and it is one that is easy to apply to ‘truths’ that we do not personally accept. It is much more challenging to apply it to the truths that we do accept, and it is both insightful and disorienting to take the time to reflect upon our most closely held truths and try to see the ways in which they have been established by those with power for their own benefit.

¹³ *The Will to Knowledge*, above n 6, 67.

The eighth insight is that *law is a strategy of power*. It is usually a particularly forceful strategy of power. Law is a strategy of power used by the state and by those with influence over the state's lawmaking processes to influence the thoughts, actions and wellbeing of others by stating that certain behaviours are acceptable and other behaviours will be punished, or lead to undesirable consequences. Law is a mechanism deployed by the state to compel members of the community to refrain from causing certain types of harm, to keep promises, to be careful, and so on. In this conception of the nature of law, the content of the positive law is determined not by alignment with natural law, justice, moral principles, human rights or divine principles, but as the outcome of the contests of power that take place in the political and legislative spheres. Law is both the outcome of conflicts of power and a tool used by some to exercise power over others.

Law was not actually one of Foucault's explicit objects of investigation. He preferred to explore the nature of non-legal power. Nevertheless, law did feature in many of his texts. In *Nietzsche, Genealogy, History*, he wrote:

Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.¹⁴

In *The Will to Knowledge*, Foucault acknowledged the historical importance of law as a technology of power:

Law was not simply a weapon skilfully wielded by monarchs: it was the monarchic system's mode of manifestation and the form of its acceptability. In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law.¹⁵

Foucault also offered a further important insight (the ninth) about the relationship between law and power: *law is only one of the many strategies of power*; and it is far from the most influential.

Law is neither the truth of power nor its alibi. It is an instrument of power which is at once complex and partial. The form of law with its effects of prohibition needs to be resituated among a number of other-non-judicial mechanisms.¹⁶

As explained earlier, Foucault challenged our tendency to equate 'power' with repression exercised by some centralised agency. He insisted that a focus upon sovereignty and centralised law obscures the operation of more subtle mechanisms of power.¹⁷ He concluded that any analysis of power should be directed not towards juridical sovereignty and the state, but towards the operations of power in dispersed and localised sites (a point

¹⁴ Michel Foucault, 'Nietzsche, Genealogy, History' in Paul Rabinow (ed), *The Foucault Reader* (Penguin Books, 1991) 85.

¹⁵ *The Will to Knowledge*, above n 6, 87.

¹⁶ *Two Lectures*, above n 7, 141.

¹⁷ In *The Will to Knowledge*, Foucault suggested that historically there has been a competition between 'biopower' and juridical power, manifested in the "growing importance assumed by the action of the norm, at the expense of the juridical system of the law": above n 6, 144.

made earlier in relation to micro-power). In *The Will to Knowledge*, Foucault wrote:

I do not mean to say that law fades into the background or that institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.¹⁸

In *Truth and Power*, he wrote:

To pose the problem in terms of the state means to continue posing it in terms of sovereign and sovereignty, that is to say, in terms of law. If one describes all these phenomena of power as dependent on the state apparatus, this means grasping them as essentially repressive: the army as a power of death, police and justice as punitive instances, etc. I don't want to say that the state isn't important; what I want to say is that relations of power, and hence the analysis that must be made of them, necessarily extend beyond the limits of the state. In two senses: first of all, because the state, for all the omnipotence of its apparatuses, is far from being able to occupy the whole field of actual power relations, and further because the state can only operate on the basis of other, already existing power relations.¹⁹

The long term behaviour of others, in large numbers, are shaped not by legal rules but by the subtler strategies deployed by educational institutions, religious institutions, advertising, the media, advertising, customs and tradition. This is an insight of direct relevance to legal scholars: in analysing the impact of the law upon human behaviours, one cannot disregard the many other strategies of power at play, and which form law's context.

The tenth and final insight is one that I personally have struggled to fully appreciate and apply consistently. Foucault argued that *power and discourse are non-subjective*. By this he meant that power is not exercised by subjects, and discourse is not created by subjects. Rather, power in the form of discourse, creates subjects:

If there is one approach that I do reject [it is the one] which gives absolute priority to the observing subject, which attributes a constituent role to an act, which places its own point of view at the origin of all historicity — which, in short, leads to a transcendental consciousness. It seems to me that the historical analysis of ... discourse, in the last resort, be subject, not to a theory of the knowing subject, but rather to a theory of discursive practice.²⁰

Psychiatric discourses produce both the sane and the mentally ill person. Penological discourses produce both the law-abiding citizen and the criminal. Neoliberalism is not the creation of wealthy capitalists; rather, wealthy capitalists, as subjects, are created by neoliberalism. Marxists are created by Marxism, and feminists are created by feminism. Within the

¹⁸ *The Will to Knowledge*, above n 6, 144.

¹⁹ *Truth and Power*, above n 4, 63–64.

²⁰ Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (Taylor & Francis, 2012) 172.

context of law, legal positivism is not the creation of legal positivists; rather, legal positivists are the creation of legal positivism. The discourse pre-exists the subjectivity. When seeking to identify the 'cause' of a particular strategy of power, it would be erroneous to locate the cause in the exercise by a powerful subject of their free will. Rather, we should identify the historical and contextual contingencies that facilitate the relevant discourse and are consistent with its successful propagation.

For example, if we are critically analysing Australia's current immigration policy and the reasons why certain refugees and asylum seekers are being held in detention centres, we should not attribute this state of affairs to the wilful choices of certain individual politicians and law makers. Rather, we should recognise that the detention of these people is appropriate and correct within the context of certain discourses; we should identify those discourses; and we should identify the historical and contextual contingencies that lead to those discourses being dominant over competing discourses within which detention is seen as inappropriate and incorrect. Our analysis then focuses upon the ways in which pro-detention and anti-detention discourses interact, and the ways in which the strategies of power deployed by these discourses are deployed more or less successfully.

As with all of these insights, the Foucauldian approach to identifying the causes of a particular state of affairs, and the emphasis upon non-subjective contingencies rather than individual choices and actions, can provide an understanding not otherwise achievable, and reveal courses of action not otherwise apparent. The challenge with this final insight is its application to our own subjectivity. I personally find it very difficult to attribute my beliefs and actions to the discourses by which I am dominated rather than to my own conscious choices and free will. But when I reflect upon this insight, I recognise that my ideas about, say, law or legal education are not my own, but come from elsewhere; that who I am as a subject is made up of numerous such externally originated ideas; and that with this insight, as with the others described above, Foucault, perhaps, got it right.

III Conclusion

Foucault taught me that power is everywhere, and that it is not a bad thing. Power can never be abolished, and it is not monopolised by the powerful. Power always provokes resistance, which in turn provokes a different expression of power. Knowledge and truth are intimately connected with power. Law is a strategy of power, and it is not the most important strategy of power. And power creates subjects, rather than being something that subjects seize and wield.

For me, these insights were and are transformative. They continue to inform my understanding of the nature of law and its manner of function. They inform my perception of political events, and they often inform the way I view communications and other interactions between individuals,

including my own interactions, enabling me — when appropriate — to see disagreements and conflicts not as ‘true’ versus ‘false’ or ‘right’ versus ‘wrong’, but as evidence of the natural and unavoidable tension between different discourses and as part of the larger map of competing vectors of power that exist at every level of society. There is a kind of empathy and compassion that emerges when we can loosen our grasp upon our own preferred discourse, see competing discourses not as ‘wrong’ or ‘false’ but as simply ‘other’, see our disagreements and conflicts as an inevitable characteristic of human life, and recognise and accept power not as something to be distrusted and opposed but as a natural mechanism by which discourses jostle for dominance.

I sincerely hope that Foucault’s ideas, and my own simplified and contextualised versions of them, prove useful during the conversations to take place about the law and politics of control and power.